

**JUDICIAL COUNCIL OF CALIFORNIA
ADMINISTRATIVE OFFICE OF THE COURTS**

455 Golden Gate Avenue
San Francisco, California 94102-3688

Report

TO: Members of the Judicial Council

FROM: Civil and Small Claims Advisory Committee
Hon. Douglas P. Miller, Chair
Small Claims and Limited Civil Cases Subcommittee
Hon. Mary Thornton House, Chair
Uniform Rules Subcommittee
Hon. Elaine Watters, Chair
Cara Vonk, 415-865-7669, cara.vonk@jud.ca.gov and Patrick O'Donnell,
415-865-7665, patrick.o'donnell@jud.ca.gov, Subcommittee Counsel

DATE: October 16, 2002

SUBJECT: Ex Parte Applications (amend Cal. Rules of Court, rule 379)(Action
Required)

Issue Statement

Under rule 379, a party seeking an ex parte order must notify all parties no later than 10:00 a.m. the court day before the ex parte appearance, absent a showing of exceptional circumstances. The general time required for notice in rule 379 is problematic in many unlawful detainer cases, especially where an eviction is taking place on a Friday, and the ex parte application under the current rule cannot be considered until the following Monday. Thus, it has been proposed that the Judicial Council amend rule 379 to provide for a speedier ex parte procedure in unlawful detainer cases because some courts will not process requests for an ex parte order in such cases unless notice has been given by 10:00 a.m. the court day before the hearing.

Recommendation

The Civil and Small Claims Advisory Committee recommends that the Judicial Council amend rule 379, effective January 1, 2003, to provide for a shorter notice period for unlawful detainer cases and to make other clarifying changes.

The text of amended rule 379 is attached at pages 5–7.

Rationale for Recommendation

Shorter notice in unlawful detainer proceedings

Unlawful detainer cases have statutory priority (See Code of Civil Procedure, § 1179a), and quick action is often required. The current ex parte procedure under rule 379, which requires that the applicant notify all parties no later than 10:00 a.m. the court day before the ex parte appearance, sometimes takes too much time in unlawful detainer cases. Accordingly, subdivision (b) of rule 379 should be amended to clarify that “[a] party seeking an ex parte order in an unlawful detainer proceeding may provide shorter notice provided that the notice given is reasonable.”

This proposal to modify rule 379(b) is consistent with the expedited and summary nature of unlawful detainer proceedings and their need for special treatment.

Requirement that clerk must file ex parte applications

In addition, there have been problems with clerks refusing to file or promptly submit to a judicial officer ex parte applications which do not indicate that notice was given by 10:00 a.m. the court day before the ex parte appearance. The issue whether sufficient notice has been given is a matter for a judicial officer to determine. To eliminate any confusion or ambiguity in the courts as to how ex parte applications are to be handled, new subdivision (c) should be added to rule 379. It provides: “The clerk must not reject an ex parte application for filing and must promptly present the application to the appropriate judicial officer for consideration, notwithstanding the failure of an applicant to comply with the notification requirements in (b).” The proposal should eliminate the problem of clerks rejecting ex parte applications if notice of the ex parte request has not been given by 10:00 a.m. the court day before the hearing.

Other amendments to rule 379

In addition to the change in subdivision (b) regarding the notice requirements and the addition of new subdivision (c), rule 379 should be amended in certain other respects. First, subdivision (a)(1) should be amended to state that the declaration in support of an ex parte application must indicate that the applicant had informed the opposing party when and where the application would be made within “the applicable time period under (b).” The quoted language would replace the phrase “a reasonable time before the application.” This amendment will make subdivision (a)(1) consistent with subdivision (b).

Second, the last sentence of the first paragraph of subdivision (b) on the declaration regarding notice should be rewritten for clarity and relocated to subdivision (e)(2) on notice. The second and third paragraphs of subdivision (b) should be placed in new subdivision (d) entitled “Contents of application.”

Third, because of the addition of new subdivision (c) on the filing of applications, subsequent subdivisions should be relettered.

Fourth, new subdivisions (e) and (f) should include additional language clarifying the requirements for the declaration accompanying the application.

Fifth, throughout rule 379, the word “must” should replace “shall.” This change implements the policy favoring the use of plain language in the California Rules of Court. For similar reasons, in new subdivision (e), the word “presentation” should replace “presentment.” And in new subdivisions (f) and (i), the words “a memorandum of” should be placed before “points and authorities.”

Finally, wherever in the rule after the mention of a “party,” there are words such as “and/or counsel” and “and the opposing party’s attorney,” these words should be eliminated. Under the definitions in the California Rules of Court, the term “party” includes the party’s attorney of record. Hence, the additional words are unnecessary.

Alternative Actions Considered

A version of this proposal to amend rule 379 was circulated for comment in 2001. The rule that was circulated at that time would have added to rule 379 a provision that “a party seeking an ex parte order in an unlawful detainer proceeding must give reasonable notice before the ex parte appearance.” After reviewing the original comments, the Civil and Small Claims Advisory Committee had some concerns that a “reasonable notice” standard might lead to different local practices, interpretations, and requirements. The committee therefore proposed that rule 379 be amended to require at least four hours’ notice before the ex parte appearance in unlawful detainer proceedings, unless there are exceptional circumstances. A second version of amended rule 379 containing the 4-hour notice provision was circulated in the spring of 2002.

Based on review of the most recent comments and further consideration, the committee recommends that rule 379 be amended as provided in the attached rule. The proposed rule balances the requirement that sufficient notice must be given of a party’s intention to appear ex parte and the practical need for shorter notice in unlawful detainer cases.

Comments From Interested Parties

A total of 19 comments were received on the amendment of rule 379. The commentators included a legal aid foundation, the coordinator at a self-help legal access center, the State Bar Standing Committee on the Delivery of Legal Services, a local bar association, three commissioners, a court staff attorney, a court rules coordinator, two court clerks, an attorney with California Rural Legal Assistance, and the Court Executives Advisory Committee.¹

¹ A chart summarizing the public comments and the committee’s responses is attached at pages 8–13.

The comments were generally favorable: 11 commentators supported the amendments, 3 agreed with them if they are modified, and 4 opposed them. The commentators who agreed with the proposal made comments such as “this is a much needed change” and they “strongly support” the proposal. They explained “the Council should modify rule 379 because it does not account for the summary nature of evictions.”

Those who opposed the amendments made comments such as that “the amendment to the rule is unnecessary, special legislation based on a perceived failure of one or two judges or clerks to follow the existing rule regarding ‘exceptional circumstances’ and “no compelling justification exists to support [a special exception for ex parte notice in unlawful detainer actions].”

The committee extensively discussed the comments from the Court Executives Advisory Committee (CEAC). CEAC recommended modifying the proposed amendments to rule 379 that were circulated for comment in the spring of 2002 by eliminating the four-hour notice requirement for unlawful detainers and substituting a provision that “A party seeking an ex parte order in an unlawful detainer proceeding may give less than the required notice before the ex parte appearance if there is a showing of exceptional circumstances.” CEAC also suggested adding a provision indicating that a court must not reject an ex parte application for filing in an unlawful detainer proceeding if it is accompanied by a declaration containing a showing of exceptional circumstances that potentially warrants a shortened notice period.

The committee agreed, in part, with these proposed revisions. It modified the first proposed sentence to provide for shorter notice in unlawful detainer proceedings provided the notice is reasonable. As to the recommended provision regarding filing, it modified the CEAC proposal to provide that clerks must not reject any ex parte applications for filing and must promptly submit all applications to the appropriate judicial officer for consideration, notwithstanding the failure of an applicant to comply with the notice requirements of (b). This provision in new subdivision (c) is based on the principle that the sufficiency of notice should be determined by a judicial officer, and not by a clerk.

Implementation Requirements and Costs

The availability of a more flexible ex parte rule for unlawful detainer cases and the requirement that clerks file and promptly present ex parte applications to the applicable judicial officer may require some implementation efforts. But the amended rule should ultimately improve the litigation process for litigants and the courts.

Attachments

Rule 379 of the California Rules of Court is amended, effective January 1, 2003,
to read:

Rule 379. Ex parte applications and orders

(a) **[Ex parte application]** An ex parte application for an order ~~shall~~ must not be made ~~ex parte unless it appears~~ accompanied by an affidavit or a declaration showing:

- (1) that, within ~~a reasonable time before the application~~ the applicable time period under (b), the party applicant informed the opposing party ~~or the opposing party's attorney~~ when and where the application would be made; or
- (2) that the party applicant in good faith attempted to inform the opposing party ~~and the opposing party's attorney~~ but was unable to do so, specifying the efforts made to inform them opposing party; or
- (3) that, for reasons specified, the party applicant should not be required to inform the opposing party ~~or the opposing party's attorney~~.

(b) **[Time of notice; time of notice in unlawful detainer proceedings]** A party seeking an ex parte order ~~shall~~ must notify all parties no later than 10:00 a.m. the court day before the ex parte appearance, absent a showing of exceptional circumstances that justify a shorter time for notice. A party seeking an ex parte order in an unlawful detainer proceeding may provide shorter notice provided that the notice given is reasonable. A declaration of notice, including the date, time, manner, and name of the party informed, the relief sought, any response, and whether opposition is expected, or a declaration stating reasons why notice should not be required, shall accompany every request for an ex parte order.

(c) **[Filing and presentation of the ex parte application]** The clerk must not reject an ex parte application for filing and must promptly present the application to the appropriate judicial officer for consideration, notwithstanding the failure of an applicant to comply with the notification requirements in (b).

1
2 **(d) [Contents of application]**
3

- 4 (1) ~~A request~~ An ex parte application for an ~~ex parte~~ order ~~shall~~ must
5 state the name, address, and telephone number of any attorney
6 known to the applicant to be an attorney for any party or, if no
7 such attorney is known, the name, address, and telephone number
8 of such party if known to the applicant.
9
- 10 (2) ~~When~~ If an ex parte application for an ~~ex parte~~ order has been
11 made to the court and has been refused in whole or in part, any
12 subsequent application of the same character or for the same relief,
13 although made upon an alleged different state of facts, ~~shall~~ must
14 include a full disclosure of any ~~prior~~ previous applications and the
15 court's actions.
16

17 **(e)(e) [Contents of notice and declaration regarding notice]**
18

- 19 (1) When notice of an ex parte application is given, the person giving
20 notice ~~shall~~ must state with specificity the nature of the relief to be
21 requested and the date, time, and place for the ~~presentment~~
22 presentation of the application, and ~~shall~~ must attempt to determine
23 whether the opposing party ~~and/or counsel~~ will appear to oppose
24 the application.
25
- 26 (2) Every ex parte application must be accompanied by a declaration
27 regarding notice that states:
28
- 29 (A) the notice given, including the date, time, manner, and name
30 of the party informed, the relief sought, any response, and
31 whether opposition is expected; or
32
- 33 (B) why notice should not be required.
34
- 35 (3) If notice was provided later than 10:00 a.m. the court day before
36 the ex parte appearance, the declaration regarding notice must
37 explain:
38
- 39 (A) the exceptional circumstances that justify the shorter notice,
40 or
41
- 42 (B) in unlawful detainer proceedings, why the notice given is
43 reasonable.

1
2 **(d)(f)** [Required documents] ~~An~~ ex parte applications ~~shall~~ must be in
3 writing and include all of the following:
4

- 5 (1) An application containing the case caption and stating the relief
6 requested;
7
8 (2) A declaration in support of the application making the factual
9 showing required under (g)
10
11 (3) A competent declaration based on personal knowledge ~~as~~
12 ~~described in~~ of the notice given under subdivision (b)(e);
13
14 (4) A memorandum of points and authorities; and
15
16 (5) A proposed order.
17

18 **(e)(g)** [Affirmative factual showing required] An applicant ~~shall~~ must make
19 an affirmative factual showing in a declaration containing competent
20 testimony based on personal knowledge of irreparable harm, immediate
21 danger, or any other statutory basis for granting ~~ex parte~~ relief ex parte
22 ~~rather than setting the matter for hearing on noticed motion.~~
23

24 **(f)(h)** [Service of papers] Parties appearing at the ex parte hearing ~~shall~~ must
25 serve the ex parte application or any written opposition on all other
26 appearing parties at the first reasonable opportunity. Absent exceptional
27 circumstances, no hearing ~~shall~~ may be conducted unless such service
28 has been made.
29

30 **(g)(i)** [Personal appearance requirements] An ex parte application will be
31 considered without a personal appearance of the applicant ~~or applicant's~~
32 ~~counsel~~ in the following cases only:
33

- 34 (1) Applications to file a memorandum of points and authorities in
35 excess of the applicable page limit;
36
37 (2) Setting of hearing dates on alternative writs and orders to show
38 cause; and
39
40 (3) Stipulations by the parties or other orders of the court.

Comments for SPR02-13
Ex Parte Applications

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
1.	A. Christian Abasto Legal Aid Foundation of Los Angeles	A	Y	The Legal Aid Foundation of Los Angeles agrees with the proposed changes. We agree that the Council should modify Rule 379 because it does not account for the summary nature of evictions. This amendment is necessary because, too often, a five-day Notice to Vacate is served on, say, a Friday evening of a three-day weekend (Memorial Day weekend). It will take a tenant until Tuesday to find legal help. By the time the tenant gets to the attorney's office, at 10:15 a.m. Tuesday, it is too late to give ex parte notice for that day or even for Wednesday. A significant number of tenants who receive notices to vacate never received the summons or complaint and had no opportunity to file an answer. This may be due to "sewer service" or a post-foreclosure case where not all the tenants were named or served. The proposed modification to Rule 379 will enable tenants to have at least an opportunity to dispute the default judgment before they are locked out. If a plaintiff's attorney or landlord cannot appear in court on less than 24 hour's notice, he can postpone the lockout, and request the court to hear the ex parte application a day later, or the landlord can choose not to appear and wait for the motion date.	The committee noted the organization's comments, support, and explanation for amending rule 379. It agreed that subdivision (b) should be amended to better deal with unlawful detainer proceedings.
2.	Mia A. Baker Legislative Subcommittee Chair Standing Committee on the Delivery of Legal Services	A	Y	The standing committee reviewed, approved and strongly supports the following proposal, SPR02-13.	No response required.

Positions: A = Agree; AM = Agree only if modified; N = Do not agree.

Comments for SPR02-13
Ex Parte Applications

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
	The State Bar of California				
3.	Hon. Richard Best Commissioner Superior Court of California, County of San Francisco	N	N	<p>This proposed amendment to the rule is unnecessary, special legislation based on a perceived failure of one or two judges or clerks to follow the existing rule regarding “exceptional circumstances.” This is not a basis for rule making and will not be effective in correcting the isolated problem it addresses. The rule already provides for shorter notice upon a showing of exceptional circumstances. This amendment would change the rule for unlawful detainer cases when there are no exceptional circumstances.</p> <p>The rule as written will not accomplish what it was designed to do. It requires “at least” 4 hours notice. But the judge or clerk might require more—24 hours, 36 or more, or it might decide 10:00 a.m. the day before is about right. The rule does not require courts to have judges “on call” at all times to handle ex parte unlawful detainer motions of every nature. If someone wants to set a motion to compel further answers to interrogatories on shortened notice when there is no trial date, does this rule require the assigned judge or presiding judge to stop all proceedings to hear the ex parte request on four hours notice? Will the clerk make that determination?</p> <p>Subpart (g) should require service of the ex parte application by personal service or by fax or e-mail at the time notice is given if requested or if a fax number or e-mail address is known. Many lawyers</p>	<p>The committee disagreed. The existing rule does not appear to be working satisfactorily. The problem is more extensive than the commentator indicates. There is a need to clarify the rule so that ex parte applications in unlawful detainer cases may be considered on shorter notice.</p> <p>The final version of the rule does not contain the 4-hour notice provision.</p> <p>The current provision requiring service at the “first reasonable opportunity” appears</p>

Comments for SPR02-13
Ex Parte Applications

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
				<p>do not serve the papers until opposing counsel show up in court responding to some vague oral notice left sometime on their voice mail.</p> <p>The original rule worked from 1984. The Judicial Council should trust the judiciary to do its job and apply a “reasonable notice” standard to all ex parte motions. This rule has been amended or reviewed in 1997, 1999, 2000, 2001, and again in 2002.</p>	<p>to be working satisfactorily.</p> <p>The amendments have clarified the law on ex parte applications and have made the procedures more predictable and uniform throughout the state.</p>
4.	Hon. Gary Bounds Commissioner Superior Court of California, County of Los Angeles	N	N	With regard to the shortening of time for noticing ex parte matters, I do not think fundamental fairness is being complied with in shortening the notice to four hours, and I would be opposed to that change.	The committee disagreed that shortening the time would be unfavorable. However, it has substituted “shorter notice” for “at least four hours notice.”
5.	Patrick Burton Staff Attorney Superior Court of California, County of San Francisco	N	N	Unlawful detainer ex partes are not limited to eviction stays. For instance, many times landlords bring ex parte applications to enter judgment pursuant to stipulation. A 4-hour warning may not permit the tenant sufficient time to oppose such a drastic application. I think the general rule is fine as is. However, a landlord may not have sufficient time to oppose an eviction stay. What if the tenant threatened to burn the premises down?	The amendments to rule 379 properly recognize that shorter notice may be appropriate in unlawful detainer cases. The final version does not contain the 4-hour notice requirement.
6.	George Ducich Superior Court of California, County of San Diego	AM	N	The court agrees with the proposed rule changes, although we feel that shortening time for ex parte notice will create a time crunch for the business offices to prepare the ex parte calendars and get the cases to court for the hearings. It is felt that opposing	The committee believes the amended rule appropriately addresses the problems in unlawful detainer cases.

Positions: A = Agree; AM = Agree only if modified; N = Do not agree.

Comments for SPR02-13
Ex Parte Applications

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
				counsel may not be available due to other appearances delaying proceedings for the court. Also, in most cases, ex partes in unlawful detainer cases do not require emergency status unless a lockout is pending. Perhaps a provision should be made to simply shorten time for notice when there is showing that a lockout is pending.	
7.	Timothy Gee Management Analyst III Planning and Development Superior Court of California, County of San Mateo	A	Y	The problems with Friday evictions is a real one and, given the shortened times for unlawful detainers, this would seem to be an appropriate need for the rule change.	The committee agreed.
8.	Stephanie Harbin Supervising Legal Clerk II Superior Court of California, County of Stanislaus	A	N	Agree with proposed changes.	No response required.
9.	Sandra Mason Director of Civil Operations Superior Court of California, County of San Luis Obispo	A	N	Agree with proposed changes.	No response required.
10.	Lori Meseke Judicial Council Liaison Chair San Joaquin County Bar Association	A	N	Agree with proposed changes.	No response required.
11.	Hon. Steven L. Monette Commissioner Superior Court of California, County of Los Angeles	N	N	I am opposed to carving out a special exception for ex parte notice requirements in unlawful detainer actions. No compelling justification exists to support such an exception, and if any justification does arguably exist, it is outweighed by the benefit of	The committee disagreed. Unlawful detainer cases are sufficiently different to make amendment of the rule appropriate.

Positions: A = Agree; AM = Agree only if modified; N = Do not agree.

Comments for SPR02-13
Ex Parte Applications

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
				maintaining consistency and uniformity in ex parte notice requirements.	
12.	Andrea Nelson Superior Court of California, County of Butte	A	N	Agree with proposed changes.	No response required.
13.	Mary Nichols Supervisor Courtroom Clerk Superior Court of California, County of Stanislaus	A	N	Agree with proposed changes.	No response required.
14.	Lenor R. Noll Deputy Court Executive Officer Superior Court of California, County of Monterey	A	N	Agree with proposed changes.	No response required.
15.	Nancy Palandati Regional Migrant Attorney California Rural Legal Assistance	A	N	Agree with proposed changes.	No response required.
16.	Tina Rasnow Coordinator Superior Court of California, County of Ventura	A	N	I applaud the proposed changes to Rule 379 on ex parte applications in unlawful detainer cases.	No response required.
17.	Alan Slater, Chair Court Executives Advisory Committee Judicial Council of California	AM	Y	The Court Executives Advisory Committee (CEAC) recommends to the Judicial Council's Civil and Small Claims Advisory Committee approval of the amendments to rule of court 379, subject to the following modifications: Subsection (b) [Time of Notice]	The committee agreed, in part, with the Court Executive Advisory Committee's (CEAC) comments. It recommends that rule 379 be amended to provide for shorter notice in unlawful detainer cases. As to the proposed provision regarding filing, the committee recommends that it apply to all ex parte applications, notwithstanding a

Positions: A = Agree; AM = Agree only if modified; N = Do not agree.

Comments for SPR02-13
Ex Parte Applications

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
				<p>Amend this subsection to read as follows (see changes in bold);</p> <p>“A party seeking an ex parte order, <u>except in an unlawful detainer proceeding, shall</u> must notify all parties no later than 10:00 a.m. the court day before the ex parte appearance, absent showing of exceptional circumstances. <u>A party seeking an ex parte order in an unlawful detainer proceeding must</u> may give less than the required at least four hours’ notice before the ex parte appearance unless if there is a showing of exceptional circumstances. The court shall not reject a filing if the party seeking an ex parte order in an unlawful detainer proceeding fails to comply with the 10:00 a.m. notification requirement if a filing is accompanied by a declaration containing a showing of exceptional circumstances, potentially warranting a shortened time period of the pre-hearing notice. A declaration of notice, including the date, time, manner, and name of the party informed, the relief sought, any response, and whether opposition is expected, or declaration stating reasons why notice should not be required, shall accompany every request for an ex parte order.”</p>	<p>party’s failure to apply to the notice provisions in (b). The issue whether sufficient notice has been given is a matter for a judicial officer to determine.</p>
18.	Richard K. Uno Managing Attorney Human Rights/Fair Housing Commission Sacramento, California	A	N	<p>This is a much-needed change. The old requirement works a hardship on tenants who were pro per.</p>	<p>The committee agreed that a change in rule 379 is desirable.</p>

Comments for SPR02-13
Ex Parte Applications

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
19.	Charlene Walker Division Manager Superior Court of California, County of Sacramento	AM	N	Given that most of these come from pro se litigants, AOC should consider developing an “optional” form written in easily understood language which both explains the notice requirement and that can be used as a declaration form.	The committee will consider this proposal in the future.